24

No. 05-593

Supreme Court, U.S.
FILED
JUL 14 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

PAT OSBORN,

Petitioner,

v.

BARRY HALEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Sixth Circuit

BRIEF OF THE STATES OF CALIFORNIA, IOWA, MISSISSIPPI AND WEST VIRGINIA, AS *AMICI CURIAE*, SUPPORTING THE PETITIONER

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QUESTIONS PRESENTED

This *amicus curiae* brief addresses the following questions:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF OF *AMICI CURIAE* 1

INTEREST OF THE *AMICI CURIAE* STATES 1

STATEMENT 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. The Westfall Act Does Not Authorize Attorney General Certification Based Solely on Incident Denial 6

B. When a District Court Exercising Removal Jurisdiction Determines That the Attorney General Certification That Caused Removal Under the Westfall Act Is Faulty, the Action Must Be Remanded 10

1. The text of the Westfall Act and this Court's previous interpretation of it support remand 10

2. The Westfall Act should be interpreted to avoid the substantial constitutional question that will arise if federal courts are permitted to adjudicate state law claims between non-diverse individual citizens 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 15

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) ..... *passim*

Kircher v. Putnam Funds Trust, 05-409, __ U.S. __ (2006) 1

Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994) 10

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 7

Mesa v. California, 489 U.S. 121 (1989) 14

Osborn v. Bank of the United States, 22 U.S. (Wheat.) 738 (1824) 13, 14

Tafflin v. Levitt, 493 U.S. 455 (1990) 7

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 12

Westfall v. Erwin, 484 U.S. 292 (1988) 8, 9

FEDERAL STATUTES

28 C.F.R. § 15.3 6

28 U.S.C.
§ 1332 14
§ 1447(d) 2, 14
§ 2679 8
§ 2679(b)(1) 6
§ 2679(c) 7

TABLE OF AUTHORITIES – Continued

Page

§ 2679(d) 9
§ 2679(d)(1) 1, 6
§ 2679(d)(2) 10, 11
§ 2679(d)(3) 11

CONSTITUTIONAL PROVISIONS

U.S. Const., art. III, § 2 ..... 10, 12, 13, 14

OTHER AUTHORITIES

Federalist 83 (Hamilton), in Clinton Rossiter, ed., The Federalist Papers 495 13

H.R. Rep. 100-700, 1988 U.S.C.C.A.N. 5945, 5949 (1988) 9

BRIEF OF *AMICI CURIAE*

The *Amici Curiae* States of California, *et alia* ("*Amici* States"), respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4.

INTEREST OF THE *AMICI CURIAE* STATES

This case concerns whether the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") authorizes a federal court to exercise and retain jurisdiction over a garden-variety tort claim that would ordinarily be resolved before a state court. When a federal employee is sued in tort, the Westfall Act authorizes the United States Attorney General, or his designee, to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose. . . ." 28 U.S.C. § 2679(d)(1). The effect of such a certification is threefold: the United States is substituted as the defendant in the place of the defendant federal employee, who is dismissed; the action proceeds as one under the Federal Tort Claims Act, subject to all its attendant procedural requirements; and if the action was filed in state court, as was this action, it is removed to federal court. This Court has already determined that Westfall Act certifications are reviewable. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995). This case may determine whether a faulty Westfall Act certification is sufficient to eliminate state court jurisdiction.

The *Amici* States acknowledge that this case may be controlled by this Court's recent decision in *Kircher v.*

Putnam Funds Trust, 05-409, ___ U.S. ___ (2006) (holding that orders remanding a case for want of preclusion under the Securities Litigation Uniform Standards Act of 1988 are not appealable under 28 U.S.C. § 1447(d)), and determined by the third question presented. However, if the Court reaches the other questions presented, its decision will likely resolve two related issues of statutory construction that taken together have important constitutional implications: whether a Westfall Act certification premised solely on denial of the alleged tortious incident is a valid basis upon which a federal court may assert subject matter jurisdiction; and whether a district court is authorized to remand an action to state court when it concludes that a Westfall Act certification is invalid. The States are interested in the interpretation given to these provisions of the Westfall Act because the reasoning of the Sixth Circuit below would extend federal jurisdiction over a type of claim that the Constitution leaves to the States – tort actions between nondiverse citizens. The *Amici* States are concerned that the Sixth Circuit's decision constitutes a usurpation of state court jurisdiction that is neither contemplated by the Westfall Act, nor authorized by the Constitution. The *Amici* States therefore have a substantial interest in this case.

STATEMENT

Petitioner Pat Osborn alleges that her former employer, respondent Land Between the Lakes Assoc. ("LBLA"), a private contractor that provides services to the United States Forest Service ("Forest Service"), was induced to terminate her employment by respondent Barry Haley, a Forest Service employee. Osborn filed suit

against Haley and others in the Trigg County Circuit Court, in Trigg County, Kentucky, claiming that Haley's actions fell outside the scope of his federal employment. Pet. App. 3a. Forest Service employees are prohibited from "participat[ing] in any LBLA decision concerning the realtionship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees." Pet. App. 3a. The United States concedes that if Haley did induce Osborn's firing, his conduct would fall outside the scope of his federal employment. Pet. App. 3a. Nevertheless, on Haley's behalf the United States invoked its Westfall Act authority by certifying "that Haley had been acting *within* the scope of his employment at the time of the incident giving rise to [petitioner's] allegation." Pet. App. 3a. This certification was not premised on the nature of the allegations contained in the complaint, but solely on "incident denial" – the United States' contention that the alleged conduct never occurred. The action was removed to federal court, on the sole basis of this certification. The United States then moved to substitute itself as defendant in Haley's place, and to dismiss the action on the grounds that Osborn had failed to exhaust her administrative remedies under the Tort Claims Act. Pet. App. 19a.

The district court overruled the Government's notice of substitution and scope-of-employment certification, and denied the motion to dismiss, holding that a certification asserting that the harm-causing incident never took place does not satisfy the requirements of the Westfall Act. Pet App. 3a, 20a. The district court then concluded that "the absence of the United States as a party to this case destroy[ed] this Court's jurisdiction" and compelled remand to the state court. Pet. App. 20a. The Sixth Circuit reversed the district court order remanding the action to the

Trigg County Circuit Court, reasoning that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' [citation omitted] including a denial of the harm-causing incident, the district court must resolve the factual dispute." Pet. App. 8a. The Sixth Circuit also held that, even if the substitution is ultimately found to be invalid, the Westfall Act forecloses remand because it provides that the certification "shall *conclusively* establish scope of office or employment for *purposes of removal.*" Pet. App. 10a.

SUMMARY OF ARGUMENT

The Westfall Act's plain text, history, and purposes all demonstrate that Congress intended that federal employees be immunized from their tortious acts only when those acts occurred within the scope of their federal employment. The Sixth Circuit's decision below giving effect to an Attorney General certification based solely upon incident denial exceeds the scope of the congressional authorization, and has practical effects that Congress did not intend. The decision below would strip the States of the Union of their traditional jurisdiction over tort claims arising outside the scope of federal employment, premised solely upon the fact the defendant is a federal employee. As a result, the federal government would bear the cost of providing a forum, defending the employee, and perhaps paying a judgment, notwithstanding the absence of any federal interest.

In the event the Court determines that an Attorney General certification premised solely upon incident denial

is invalid, the district court's retention of jurisdiction over this case would exceed the limits of its Article III jurisdiction and thereby prevent the state courts from adjudicating a case over which they have exclusive jurisdiction. The plain language of the Westfall Act does not compel district courts to retain jurisdiction when the Attorney General's certification is invalid. The doctrine of constitutional avoidance, therefore, requires the Westfall Act to be construed to allow this case, and others like it, to be remanded back to state court.

ARGUMENT

The court of appeals held, and the respondents here contend, that a federal employee who has engaged in tortious conduct outside the scope of his federal employment may enjoy the same Westfall Act protections that Congress intended only to confer upon employees acting within the scope of their federal employment. Further, the court held that when a district court determines that the federal government's invocation of the Westfall Act was faulty, and erroneously deprived a state court of its jurisdiction, the district court is powerless to remand the action. These holdings are not supported by the text or purposes of the Westfall Act, and offend the sovereign dignity of the States by authorizing the divestiture of their courts' rightful jurisdiction in violation of the Constitution.

A. The Westfall Act Does Not Authorize Attorney General Certification Based Solely on Incident Denial

Under the Westfall Act, the Attorney General has authority to certify that a tortious incident is within the scope of a federal employee's duties, but he has no authority to certify that the incident never occurred. The key section provides:

> The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

28 U.S.C. § 2679(b)(1). The next section of the Westfall Act provides that the Attorney General is required to defend a federal employee against any civil action brought for "any such damage or injury." 28 U.S.C. § 2679(c). "*Such* damage or injury" necessarily refers to damage or injury arising from the aforementioned "negligent or wrongful act or omission of any employee of the Government while acting *within the scope* of his office or employment" (emphasis added).

The application of the Westfall Act is dependent upon the Attorney General certifying "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. §§ 2679(d)(1), (d)(2), *see also* 28 C.F.R.

§ 15.3 (1995) (allowing certification by the Attorney General's designee). Determining whether an employee acted within the scope of employment "at the time of the incident out of which the claim arose" is a distinct proposition from determining whether the claim is bogus. The Attorney General will almost never be in a position to "certify" in any meaningful way that alleged tortious conduct did not occur. Whether such conduct occurred is not a matter for Attorney General certification, but for a jury determination. On the other hand, the Attorney General or his designee are uniquely competent to certify scope of employment based upon a legal analysis of the complaint. This would explain why Congress requires only that present "all process served upon him" to the United States Attorney through procedures established by the Attorney General. 28 U.S.C. § 2679(c). In short, there is nothing in the plain text or structure of the Westfall Act that would give effect to a certification based solely on incident denial.

A construction of the Westfall Act that gives effect to an Attorney General certification premised solely on incident denial would also lead to practical consequences that Congress could not have intended, and this Court should not impose. It is difficult to imagine what legitimate federal administrative or judicial interest there might be in interceding in garden-variety tort litigation between private litigants that does not actually arise within a federal employment relationship. It is clearly not legitimate if the purpose is merely to defeat the plaintiff's choice of forum, and to strip the state courts of their jurisdiction. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 477 (1982) ("state courts are presumed competent to interpret state laws"); *Tafflin v. Levitt*, 493 U.S. 455, 458

(1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"). Moreover, the burdens upon the federal taxpayer that follow certification are substantial. The employee is provided a defense and absolute immunity to suit, the federal government assumes liability for any judgment rendered for the plaintiff, and the federal courts assume the burden of adjudicating the case. Yet the Westfall Act does not suggest that Congress intended the United States to assume these burdens unless the employee was acting within the scope of federal employment.

Nor does the history of the Westfall Act suggest any reason to read into the Act a countertextual application to employees sued for conduct arising *outside* the scope of their federal employment when the United States alleges the incident never occurred. The Westfall Act was enacted in response to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that federal officials are absolutely immune from state tort claims for money damages, but only if their conduct was both within the scope of employment and discretionary in nature. *Id.* at 299; *see also Lamagno*, 515 U.S. at 417. The *Westfall* decision narrowed the scope of federal employee immunity. In response, Congress acted quickly to ensure that all federal employees would be absolutely immune to any claim arising from conduct within the scope of their federal employment. It accomplished this by amending the Federal Drivers Act, 28 U.S.C. § 2679 (1982) (FDA), and expanding its reach to cover all federal employees acting "within the scope of their employment" without any limitation based upon the discretionary nature of the conduct at issue. 28 U.S.C. § 2679; *see Lamagno*, 515 U.S.

at 425. The Westfall Act was enacted to address the concern that the *Westfall* decision had improperly limited federal employee immunity, not to expand such immunity. If Congress had intended to extend the benefits of the Westfall Act to all federal employees, or all federal employees deemed worthy by the Attorney General, it could easily have said so.

Finally, nothing in the Westfall Act's House Report evinces an intent to allow the extension of Westfall Act benefits to employees sued for conduct arising outside the scope of their federal employment. To the contrary, the Westfall Act's House Report states that "[i]f an employee is *accused* of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable." H.R. Rep. 100-700, 1988 U.S.C.C.A.N. 5945, 5949 (1988) ("House Report") (emphasis added). This language supports the notion that the Westfall Act was not intended to affect cases arising outside the scope of federal employment because "egregious" conduct is categorically excluded. It also suggests that the scope-of-employment certification ought to be premised upon the allegations of the complaint, rather than the Government's theory of the defense, because the employee remains liable who is merely "accused" of egregious conduct. This understanding is compatible with the Westfall Act's use of the term "claim." The "accusation" referred to in the House Report is the "claim" that is described in the plaintiff's complaint, and is the "claim" that supports the certification of the Attorney General under § 2679(d).

B. When a District Court Exercising Removal Jurisdiction Determines That the Attorney General Certification That Caused Removal Under the Westfall Act Is Faulty, the Action Must Be Remanded

The exercise of federal jurisdiction premised upon a faulty Attorney General certification not only violates the text and purposes of the Westfall Act, but also gives rise to a troubling constitutional question involving the proper scope of Article III jurisdiction. The retention of such jurisdiction will inevitably intrude upon the States' interest in having state law claims adjudicated by their domestic courts as an exercise of retained state sovereignty. Because federal courts are not authoritative interpreters of state law, States also have an interest in retaining jurisdiction to ensure that state law claims are resolved correctly. Accordingly, when interpreting the statute, this Court should give due weight to the constitutional doubt doctrine and the general presumption against federal jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994).

1. The text of the Westfall Act is best read to authorize remands of cases improperly certified by the Attorney General

Congress did not intend that federal courts would, on the basis of a faulty Attorney General certification, retain jurisdiction over otherwise routine state tort claims. Section 2679(d)(2) provides that where the Attorney General certifies that the employee acted within the scope of employment at the time of the alleged incident, that certification is conclusive "for purposes of removal." This language establishes only that removal to federal court

must occur upon certification. It is silent, however, regarding whether a district court must remand a case where the certification is determined to be faulty. In contrast, section 2679(d)(3) concerns cases where the Attorney General declines to certify that the defendant employee was acting within scope of federal employment at the time of the alleged tortious conduct. When this happens, the defendant federal employee may remove an action filed in state court for a scope-of-employment determination by the federal court. If successful, the substitution of the United States is compelled. If unsuccessful, the Westfall Act states that the action "shall be remanded." 28 U.S.C. § 2679(d)(3); *see Lamagno,* 515 U.S. at 431, n.7.

The remand question should be approached in the same manner as the judicial review question was approached in *Lamagno*. In *Lamagno*, the Court concluded that Congress authorized judicial review of Attorney General certifications by harmonizing sections 2679(d)(2) and 2679(d)(3), only the latter of which authorizes judicial review expressly. *Lamagno,* 515 U.S. at 431. The harmonization of sections 2679(d)(2) and 2679(d)(3) is equally appropriate here. Allowing federal courts to remand cases to state courts under both sections (d)(2) and (d)(3) would neither erase the differences between these two sections, nor render scope-of-employment certifications meaningless. To the contrary, the principal purpose of the certification process – guaranteeing that scope of employment determinations are made in a federal forum – would remain satisfied. Moreover, there appears to be no reason that remand would be less appropriate after an Attorney General certification is deemed invalid than after a defendant's motion for certification is denied. In both instances, a federal court has determined that the nature of the

allegations against the federal employee are such that the conduct occurred outside the employment relationship, and so they are not encompassed by the Westfall Act.

2. The Westfall Act should be interpreted to avoid the substantial constitutional question that will arise if federal courts are permitted to adjudicate state law claims between non-diverse individual citizens

Construing the Westfall Act to require remand where the Attorney General's scope-of-employment certification is faulty is consistent with the doctrine of constitutional avoidance. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("a statute is to be construed where fairly possible so as to avoid substantial constitutional questions"). Permitting a federal court to retain a case after determining that no federal issue or diversity of citizenship exists would raise a serious constitutional question regarding whether the scope of Article III jurisdiction has been exceeded. *Lamagno,* 515 U.S. at 437 (O'Connor, J., concurring); *id.* at 438 (Souter, J., dissenting). Requiring remand would avoid this constitutional question, while in no way undermining the purposes of the Westfall Act.

The federal principles that are embodied in the constitutional design are reflected in the Constitution's enumeration of the areas over which federal courts would have jurisdiction.

> The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend

> their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

Federalist 83 (Hamilton), in Clinton Rossiter, ed., The Federalist Papers 495, 497 (New American Library 1961). The Constitution provides jurisdiction to the federal courts as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, § 2. Article III does not grant jurisdiction over this case premised upon the presence of the United States as a party, because where an Attorney General's certification is deemed faulty, and the individual defendant is resubstituted, the United States is dismissed. *Lamagno*, 515 U.S. at 431. Accordingly, where (as here) the parties are not diverse, the only conceivable basis for jurisdiction is the "arising under" clause.

Article III's "arising under" jurisdiction was first interpreted by this Court in *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738 (1824). In *Osborn*, Chief

Justice Marshall ruled that the federal statute establishing the charter of the Bank of the United States, creating the bank, and authorizing it to act, formed "an ingredient of the original cause" such that the exercise of federal jurisdiction over a controversy concerning the State of Ohio's efforts to levy a tax against the bank was authorized by Article III. Accordingly, since *Osborn*, for a case to "arise under" federal law, it must contain a "federal ingredient."

While federal courts have the authority to interpret statutes granting them jurisdiction, the determination of a federal court's jurisdiction is not itself a "federal ingredient" within the meaning of *Osborn v. Bank of U.S. See Mesa v. California*, 489 U.S. 121, 136 (1989) (describing a jurisdictional statute as one that could not "independently support Art. III 'arising under' jurisdiction"). While the Westfall Act appears to have both substantive and procedural elements, court review of an Attorney General certification has purely jurisdictional implications, akin to a federal court's review of its diversity jurisdiction under 28 U.S.C. § 1332. When a federal court determines that a case has been improperly removed from state court on an assertion of federal diversity jurisdiction, the case will be remanded to state court for lack of federal subject matter jurisdiction. 28 U.S.C. § 1447(d). The underlying dispute in this and other tort cases arising outside the scope of federal employment – whether a tort has been committed, and if so the nature and extent of damages flowing from the tort – falls squarely within traditional state court jurisdiction and is governed by the resolution of no federal issue. Accordingly, there appears to be no constitutional basis for the exercise of federal jurisdiction over this case.

Like the district court below, in *Lamagno* the four dissenting Justices, and Justice O'Connor, expressed grave concern that rejection of an Attorney General's certification under the Westfall Act would terminate federal question jurisdiction and compel remand in cases where there is no diversity of citizenship. *See Lamagno*, 515 U.S. at 437 (O'Connor, J., concurring in part); *Lamagno*, 515 U.S. at 442 (Souter, J., dissenting). Justice Ginsberg, writing for a plurality of the Court, dismissed this concern, viewing as a "nonfrivolous federal question" the review of the Attorney General's scope of employment certification. *Id.* at 435. However, the resolution of this question merely answers whether federal courts have jurisdiction, it does not itself establish federal jurisdiction. And this case raises an additional problem not present in *Lamagno* and not anticipated by Justice Ginsburg's view of the remand question. Here, the Government concedes that the scope-of-employment certification is not premised upon the allegations of the complaint, as required by the Westfall Act (*see* discussion in Section A, *supra*), but merely upon denial of the incident. If such certifications may be used to remove cases from state courts, and bar remand after resubstitution of a federal employee, state court jurisdiction can be preempted by executive fiat, and without congressional authorization.

That this construction of the Westfall Act would offend concepts of federalism is underscored by the comparison of the implications of the Sixth Circuit's decision with federal courts' exercise of supplemental jurisdiction over state claims. When a federal court considers whether to exercise supplemental jurisdiction, it weighs concerns for judicial economy and a desire to avoid deterring federal claims against the States' interests in comity and federalism. *See City of Chicago v. International College of Surgeons*, 522

U.S. 156, 173 (1997) ("a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity"). By contrast, if federal courts are permitted to exercise jurisdiction pursuant to faulty Attorney General certifications under the Westfall Act, federalism concerns would be given no consideration, and would be counterbalanced by no cognizable federal interest because there is no federal claim to discourage, and the federal employment relationship is not implicated. Moreover, because the certification determination will normally be made at the outset of the litigation, the concern for judicial economy implicated by the exercise of supplemental jurisdiction would not be a factor weighing in favor of federal court retention of jurisdiction. These realities also suggest that the line of federal court jurisdiction under the Westfall Act should be drawn where Congress has said it should be drawn – where the nature of the alleged tortious conduct is within the scope of federal employment.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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